

BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

RESTEC CONTRACTORS, INC.,	)	
	)	
Appellant,	)	PCHB No. 89-56
	)	
v.	)	
	)	ORDER VACATING
PUGET SOUND AIR POLLUTION	)	CIVIL PENALTY
CONTROL AGENCY,	)	
	)	
Respondent.	)	

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On November 14, 1989, a Pre-hearing Order was entered in this case, setting forth a schedule for the filing, briefing, and argument of a Motion on the matter of whether a prior proceeding is a bar to this proceeding. The schedule was followed and the matter was orally argued to the Board; Wick Dufford, Presiding, and Judith A. Bendor, Chair, on January 26, 1990.

Carl L. Livingston, Attorney at Law, represented the movants, Restec Contractors, Inc. Keith D. McGoffin, Attorney at Law, represented the Puget Sound Air Pollution Control Agency (PSAPCA).

1           After considering the oral arguments, the written submissions and  
2 the file in this matter, the Pollution Control Hearings Board enters  
3 the following:

4                               FACTS

5           On the record before the Board, construing the facts most  
6 favorably for the non-moving party, these findings are made:

7           1. During August 1988, Restec Contractors engaged in a job  
8 involving the removal of asbestos material from Bagley Hall at the  
9 University of Washington in Seattle.

10          2. On August 24, 1988, Restec workers delivered to the Cedar  
11 Hills landfill a number of sealed bags of waste material from the  
12 Bagley Hall job. Representatives of the Seattle-King County Health  
13 Department on that day observed a powdery emission when they opened  
14 one of these bags. They took possession of two bags of the material  
15 and delivered them to a PSAPCA inspector.

16          3. The PSAPCA inspector forwarded a sample to the Department of  
17 Ecology's laboratory for analysis. The analysis was performed and a  
18 report made showing asbestos content at about 40% of the sample.

19          4. On September 1, 1988, the Seattle-King County Health  
20 Department issued a notice of civil penalty to Restec, for a violation  
21 described as:

22               Transporting and disposal of asbestos-containing wastes  
23               which had not been adequately wetted.

1           5. On November 9, 1988, PSAPCA issued a notice of violation to  
2 Restec for a violation described as:

3           Failing to treat all-Asbestos-Containing waste material  
4           with water during collection, processing, packaging,  
5           transporting or deposition of any Asbestos-Containing  
6           Waste Material.

7           On April 4, 1989, PSAPCA issued a notice of civil penalty to Restec  
8           for the violation alleged in the notice of violation.

9           6. Restec appealed the Health Department's penalty and the  
10          appeal was heard by a King County Hearing Examiner. After an  
11          adversary hearing, he entered a decision on August 25, 1989, holding  
12          that under the facts Restec had not violated any regulation cited to  
13          him.

14          He specifically found that

15          . . . at the time of removal and bagging, the  
16          asbestos-containing materials were adequately wetted to  
17          reasonably preclude the release of asbestos fibers into  
18          the air.

19          The hearing examiner's decision was not appealed.

20          7. The Health Department's regulations incorporate PSAPCA's  
21          regulations on asbestos removal and handling. King County Board of  
22          Health Rules and Regulations No. 8, Part IV, Section 4. The  
23          violations alleged by the Health Department and by PSAPCA are, in  
24          essence, the same. The underlying regulatory reference is PSAPCA  
25          Regulation I, Article 10, Section 10.05(b)(1).

26 ORDER VACATING  
27 CIVIL PENALTY  
PCHB No. 89-56

1 8. Restec appealed PSAPCA's civil penalty to the Pollution  
2 Control Hearings Board. To date the Board has not held an adversary  
3 hearing on the merits.

4 9. The facts and law determinative for the PSAPCA penalty are  
5 the same as those previously litigated in the appeal of the Health  
6 Department penalty.

#### 7 DISCUSSION

8 1. Restec here seeks a ruling that the hearing and decision of  
9 the King County Hearing Examiner precludes litigation of PSAPCA's  
10 Civil Penalty before this Board. Their Motion requires an examination  
11 of the doctrine of collateral estoppel.

12 Collateral estoppel prevents the relitigation of conclusive  
13 facts and issues which have been actually and necessarily determined  
14 in a prior action between parties or those in privity with parties.  
15 Bordeaux v. Ingersoll Rand Co., 71 Wn.2d 392, 429 P.2d 207 (1967);  
16 Haslund v. Seattle, 86 Wn.2d 607, 547 P.2d 1221 (1976).

17 2. That the prior conclusive determination on the merits was  
18 made in an administrative proceeding does not affect our analysis. A  
19 decision made by an administrative agency may be accorded preclusive  
20 effect in subsequent litigation. Charles Pankow, Inc. v. Holman  
21 Properties, Inc., 13 Wn App. 537, 536 P.2d 28 (1975); Peterson v.  
22 Department of Ecology, 92 Wn.2d 306, 596 P.2d 285 (1979).

1           3. Here PSAPCA's penalty represents a claim different from the  
2 penalty asserted by the Health Department. However, collateral  
3 estoppel operates to preclude the second litigation, even though a  
4 different claim or cause of action is asserted. King v. Seattle, 84  
5 Wn.2d 239, 525 P.2d 228 (1974).

6           4. The primary difficulty here is that Seattle-King County  
7 Health Department and PSAPCA are different entities. The argument on  
8 this Motion focused on whether these two agencies are in privity in  
9 connection with the subject matter in question.

10           Privy is a somewhat elusive concept. Ballantines Law  
11 Dictionary (Third Edition, 1969) begins its definition of the word, as  
12 follows:

13                 In general, an identity of interest between  
14                 persons, so that the interest of the one is  
15                 measured by the same legal standard as that of the  
                  other.

16           The idea is essentially to examine whether the relationship of  
17 entities to the subject matter is sufficiently close that precluding  
18 the second litigation works no injustice to the interests of the party  
19 precluded. Parties nominally different may be viewed as qualitatively  
20 the same. See, Rains v. State, 100 Wn.2d 660, 674 P.2d 165 (1983).

21           5. Here we deal with identical legislation sought to be  
22 implemented in a single factual setting by two different agencies,  
23 each of which is only a creature of the state for carrying out certain  
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1 police power objectives. Such objectives, in the broad sense, include  
2 protection of the public health, safety, and welfare. See, Conger v.  
3 Pierce County, 116 Wash. 27, 198 Pac. 377 (1921); Sittner v. Seattle,  
4 62 Wn.2d 834, 384 P.2d 859 (1963).

5 The intent sought to be vindicated by both agencies here is  
6 identical--the health aim of keeping asbestos fibers from being inhaled  
7 by the general public. See PSAPCA Regulation I, Section 10.01. Under  
8 the circumstances, we conclude that the two different agencies are  
9 qualitatively the same.

10 6. U.S. v. ITT Rayonier, Inc., 627 F.2d 996 (9th Cir. 1980)  
11 provides an analogy. There the United States Environmental Protection  
12 Agency was collaterally estopped from relitigating in a federal action  
13 enforcement of permit conditions already litigated at the state level  
14 between the permittee and the Washington State Department of  
15 Ecology. The two agencies were held to be in privity in acting to try  
16 to enforce the same permit issued pursuant to a single statute. The  
17 key to the decision was the close alignment of interests of the two  
18 agencies.

19 Here, as in Rayonier the underlying legal requirements and  
20 the interests served by enforcing them are identical. There is not  
21 the link of a formally shared program as in Rayonier, but a similar  
22 connection is present in that both the Health Department and PSAPCA  
23 are representing the same sovereign in pursuit of the health of the  
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1 people. In State v. Dupard, 93 Wn.2d 268, 609 P.2d 961 (1980), this  
2 connection formed the basis for finding privity where the county  
3 prosecutor brought a criminal prosecution after the state Board of  
4 Prison Terms and Paroles had conducted an earlier parole revocation  
5 hearing relating to the same offense.

6 7. State v. Dean, 56 Wn. App 377, \_\_\_\_\_ P.2d \_\_\_\_\_ (1989),  
7 cited by PSAPCA, is distinguishable from the matter at hand. The  
8 record here discloses no third parties with potentially differing  
9 interests which may not have been represented at the first proceeding.

10 Moreover, no overriding policy considerations have been  
11 argued for or are apparent which would call for rejecting the  
12 application of collateral estoppel in the circumstances at hand. See  
13 Dupard, supra.

14 8. Accordingly, we decide that the doctrine of collateral  
15 estoppel should be applied to bar the relitigation of this matter  
16 through a hearing on PSAPCA's civil penalty.

17 8. In civil penalty cases, the regulatory agency is in the  
18 position of the prosecuting authority and the notice of penalty  
19 operates functionally like a complaint. The notice of appeal is the  
20 functional equivalent of an answer which, when timely filed, prevents  
21 the party penalized from suffering a default.

22 Therefore, the appropriate remedy when collateral estoppel  
23 precludes litigation of a penalty case before this Board is neither a  
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1 judgment on the merits, nor a dismissal of the appeal, but rather an  
2 order vacating the civil penalty.

3 9. In reaching our decision, we note that the question presented  
4 is a close one and the answer we have come to is by no means obvious.  
5 PSAPCA was justified in pursuing its penalty and did so, we conclude,  
6 in good faith. Assuming we have jurisdiction to assess fees, we  
7 decide that no attorney's fees or costs should be awarded to  
8 appellants for having to defend.

9 ORDER

10 PSAPCA's Notice of Civil Penalty No. 6932 issued to Restec  
11 Contractors, Inc. is vacated.

12 DONE this 8th day of March, 1990.

13 POLLUTION CONTROL HEARINGS BOARD

14  
15 Wick Dufford

16 WICK DUFFORD, Presiding Officer

17  
18 Judith A. Bendor

19 JUDITH A. BENDOR, Chair

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PCHB No. 89-56